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In The

Supreme Court of the United States

KISSIMMEE RIVER VALLEY
SPORTSMAN ASSOCIATION,

Petitioner,

v.

CITY OF LAKELAND,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Federal Aid in Sport Fish Restoration Act, 16 U.S.C. §§ 777-777m, and regulations promulgated thereunder (the "Act"), provide an enforceable federal right of access for boats of common horsepower rating under 42 U.S.C.A. § 1983 at federally funded boat launch facilities.

Alternatively, is the right to navigate on waters of the United States so deeply engrained in our federal jurisprudence so as to make it an enforceable federal right under 42 U.S.C.A. § 1983, whether because it is implicit in the Act or notwithstanding the Act?

If an enforceable right exists under federal law, is the City of Lakeland ordinance (section 58-32 of the City of Lakeland Code), which prohibits the operation of any airboat within the City, in conflict with federal law and therefore invalid?

Whether the analytical method developed by the 11th Circuit in *Harris v. James*, 127 F.3d 993 (11th Cir. 1997) is contrary to existing Supreme Court precedent by adopting a new, distinct test for ascertaining the existence of enforceable federal rights that is in conflict with the vast majority of other Circuits.

CORPORATE DISCLOSURE STATEMENT

The Petitioner is a Florida corporation that has no parent corporations, and no publicly held company owns any of the Petitioner's stock.

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PETITION FOR WRIT OF CERTIORARI

The Kissimmee River Valley Sportsman Association respectfully requests issuance of a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered below on May 10, 2001 in order to resolve a direct conflict concerning the same Act between these two circuits on this important federal question, and to clarify the more widespread conflict among Circuits as to whether a federal regulation alone may give rise to an enforceable federal right under § 1983.

OPINION BELOW

The official report of the opinion of the court below is at 250 F.3d 1324 (11th Cir. 2001), and also may be found at 14 Fla. L. Weekly Fed. C 685. The unofficial opinion of the court below is reprinted in the Appendix hereto at page App. 1.

JURISDICTION

The judgment sought to be reviewed was entered on May 10, 2001. No motions seeking a rehearing or extension of time, nor a cross-petition under Rule 12.5 have been filed. This Court has jurisdiction pursuant to 28 U.S.C.A. § 1254(1). Pursuant to Rule 13.1, this Petition has been timely filed within 90 days after entry of the judgment.

STATUTES AND REGULATIONS INVOLVED IN THE CASE

This claim arises under the Federal Aid in Sport Fish Restoration Act, 16 U.S.C. §§ 777-777m, and regulations promulgated thereunder, 50 C.F.R. 80.1-80.26 (the "Act"). Because the citations are lengthy, only the particular Regulation and Florida Statute at issue is reproduced here, while the pertinent excerpts from the Act that are involved in this case are set forth in the Appendix, with relevant provisions underscored.

TITLE 50 – WILDLIFE AND FISHERIES CHAPTER I – UNITED STATES FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR PART 80 – ADMINISTRATIVE REQUIREMENTS, FEDERAL AID IN FISH AND FEDERAL AID IN WILDLIFE RESTORATION ACTS –

80.24 Recreational boating access facilities. The State shall allocate at least 10 percentum of each annual apportionment under Federal Aid in Sport Fish Restoration Act for recreational boating access facilities. All facilities constructed, acquired, developed, renovated, or maintained (including those existing structures for which maintenance is provided) must be for the purpose of providing additional, improved, or safer access of public waters for boating recreation as part of the State's effort for the restoration, management, and public use of sport fish. *Though a broad range of access facilities and associated amenities can qualify for funding under the 10 percent provision, power boats with common horsepower ratings must be accommodated,* and, in addition, the State must make reasonable efforts to accommodate boats with larger horsepower

ratings if they would not conflict with aquatic resources management. Any portion of the 10 percent set aside for the above purposes that remains unexpended or unobligated after two years shall revert to FWS.

Florida Statute 372.7701. Assent to federal acts

(1) *The state hereby assents to the provisions of the Federal Aid in Fish Restoration Act of August 9, 1950, as amended. The Fish and Wildlife Conservation Commission shall perform such activities as are necessary to conduct wildlife and sportfish restoration projects, as defined in such Act of Congress and in compliance with the act and rules adopted thereunder by the United States Department of the Interior.* Furthermore, the commission shall develop and implement programs to manage, protect, restore, and conserve marine mammals and the marine fishery and shall develop and implement similar programs for wild animal life and freshwater aquatic life.

(2) Revenues from fees paid by hunters and sport fishers may not be diverted to purposes other than the administration of fish and wildlife programs by the Fish and Wildlife Conservation Commission. Administration of the state fish and wildlife programs includes only those functions of fish and wildlife management as are the responsibility of and under the authority of the Fish and Wildlife Conservation Commission.

(3) This section shall be construed in harmony with s. 372.77.

STATEMENT OF THE CASE

The Petitioner, a boating organization, brought suit against the City of Lakeland under § 1983 alleging that certain provisions of the city code banning the use of airboats on all lakes within the City violated its members' right of access to waters of the United States under the Federal Aid in Sport Fish Restoration Act. The United States District Court for the Middle District of Florida dismissed the Plaintiff's Complaint for failure to state a claim, holding that the Act does not create a federal right enforceable under § 1983 to equal access for boats of common horsepower ratings at boat launch facilities constructed or maintained under Act. That opinion is appended hereto at App. 9. The District Court found that regulations promulgated under the Act, which require states to accommodate power boats with common horsepower ratings, did not "flesh out" a right created by Act, but imposed distinct obligations in order to further broad objectives of Act, and, therefore did not create an enforceable federal right under the test set forth in on *Harris v. James*, 127 F.3d 993 (11th Cir. 1997).

The Eleventh Circuit Court of Appeals affirmed, and, relying heavily upon *Harris*, held that the particular regulation imposes new and "distinct obligations" not found in the statute itself, and thus is "too far removed from the Congressional intent to constitute a 'federal right' enforceable under § 1983." Like the District Court, the Eleventh Circuit held that the regulation goes far beyond merely further defining or fleshing out the context of any "federal right" found in the statute itself. (*See* App. 1)

The Eleventh Circuit distinguished the holding of *Buckley v. City of Redding, Cal.*, 66 F.3d 188 (9th Cir. 1995) (*See* App. 29), stating that:

> [i]n *Buckley*, the Ninth Circuit held that the Act does confer a right of equal access for power boats with common horsepower ratings enforceable under § 1983. We do not find this case persuasive here. The Ninth Circuit apparently applied the three-prong test, *see supra* note 3, exclusively to the regulations promulgated under the Act, 50 C.F.R. §§ 80.3, 80.5(b), 80.21, and 80.24, and concluded that they created the enforceable right. *See id.* at 192. This is the very approach rejected in *Harris*. *See Harris*, 127 F.3d at 1008."

The Court also noted that the Ninth Circuit, unlike the *Harris* Court, did not have the benefit of *Blessing v. Freestone*, 520 U.S. 329, 117 S.Ct. 1353, 137 L.Ed. 2d 569 (1997), the Supreme Court's latest case in this area.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit opinion below directly conflicts with the Ninth Circuit's decision in *Buckley v. City of Redding*.

The decision below is in direct conflict with the Ninth Circuit's decision in *Buckley v. City of Redding*, 66 F.3d 188 (9th Cir. 1995), which held that the Federal Aid in Sport Fish Restoration Act created a right of access to waterways for use of personal watercraft with common horsepower ratings. The *Buckley* Court analyzed both the statute and its interpretative regulations, then focused on

the "provision in issue" when applying the three-prong test set forth in *Wilder v. Virginia Hosp. Ass'n.*, 486 U.S. 498, 110 S.Ct. 2510, 110 L.Ed. 2d 455 (1990). That provision (50 C.F.R. 80.24) requires power boats with common horsepower ratings to be accommodated at access facilities receiving federal funds under the Act.[1] In *Buckley*, the Plaintiff successfully challenged a City of Redding ordinance that prohibited the operation of personal watercraft on the Sacramento River. The Petitioner herein has unsuccessfully challenged a City of Lakeland ordinance prohibiting the operation of airboats on any lake within the City under the same Act. As such, a clear and direct conflict exists between the Ninth and Eleventh Circuits.

II. The Eleventh Circuit's opinion is based upon its own decision in *Harris*, which is contrary to existing Supreme Court precedent, and imposes a new, distinct test for ascertaining the existence of enforceable federal rights.

The Eleventh Circuit opinion in *Harris* has modified the test established by this Court in two ways. First, it requires a claimant to locate the particular right in the statute itself, without regard to the regulation. If the right cannot be particularized from the statute, the inquiry ends. Secondly, it will only find a right if the regulation merely "fleshes out" the right already found in the statute. However, "if the regulation goes beyond explicating

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[1] Since the Complaint alleges that an airboat is a power boat with a common horsepower rating, the allegation is taken as true for purposes of the District Court's consideration of a motion to dismiss.

the specific content of the statutory provision and imposes distinct obligations in order to further the broad objectives underlying the statutory provision, . . . the regulation is too far removed from Congressional intent to constitute a 'federal right' enforceable under § 1983." *Id.* at 1009. The new test is devoid of any useful analytical precision because it does not define what it means for a regulation to "flesh out" a statute. Is it the equivalent of being a valid exercise of delegated legislative authority? What does it mean when a regulation "goes beyond or is too far removed from legislative intent, and imposes distinct obligations upon the state"? This would appear to be the equivalent of arguing that the regulation is an invalid exercise of delegated legislative authority.

The Eleventh Circuit analysis appears to be premised upon a wariness of administrative regulations, the notion that administrative bodies are less adept than Congress at enacting good laws. Such a proposition tends to discredit an entire body of laws that are well-recognized, and undermines the credibility of the Code of Federal Regulations. If a valid federal regulation meets the test of *Wilder*, then a right ought to exist. If administrative regulations can subject citizens to the burden of fines, forfeitures, and even jail sentences, then the benefit of the rights conferred by those same regulations should inure to the citizens as well.

III. The analytical method followed by the Eleventh Circuit for ascertaining the existence of an enforceable federal right since *Harris* is in conflict with the vast majority of other Circuits.

Certiorari jurisdiction is particularly appropriate where there is widespread conflict over the appropriate test for the existence of a right to sue, especially under such an oft-litigated statute as § 1983. *See*, e.g. *C.I.R. v. Bosch's Estate*, 387 U.S. 456, 87 S.Ct. 1776, 18 L.Ed. 2d 886 (1967). Whether a "right" for § 1983 purposes can be based solely on a federal regulation, as opposed to a statute, is certainly the subject of widespread debate. A substantial majority of cases have found that actionable federal rights may be based on regulations. *See*, e.g., *Albiston v. Maine Comm'r of Human Services*, 7 F.3d 258 (1st Cir. 1993); *Pinnacle Nursing Home v. Axelrod*, 928 F.2d 1306, 1313-14 (2d Cir. 1991); *West Virginia Univ. Hospitals, Inc. v. Casey*, 885 F.2d 11, 18 (3d Cir. 1989) (citing Wright), *cert. denied*, 496 U.S. 936, 110 S.Ct. 3213, 110 L.Ed. 2d 661 (1990) ("[w]ith respect to the existence of the private rights requirement, valid federal regulations as well as federal statutes may create rights enforceable under section 1983."); *Farley v. Philadelphia Hous. Auth.*, 102 F.3d 697 (3d Cir. 1996); *Loschiavo v. City of Dearborn*, 33 F.3d 548, 551 (6th Cir. 1994), *cert. denied*, 513 U.S. 1150, 115 S.Ct. 1099, 130 L.Ed. 2d 1067 (1995) ("[b]ecause federal regulations have the force of law, they may create enforceable rights under § 1983"); *Levin v. Childers*, 101 F.3d 44, 47 (6th Cir. 1996) (describing *Loschiavo* as holding "that 'plaintiffs may use Section 1983 to enforce not only constitutional rights, but also those rights defined by federal

statutes [and federal regulations]' ") (brackets in original); *Howe v. Ellenbecker*, 8 F.3d 1258 (8th Cir. 1993), *cert. denied*, 511 U.S. 1005, 114 S.Ct. 1373, 128 L.Ed. 2d 49 (1994); *Buckley v. City of Redding, Cal.*, 66 F.3d 188 (9th Cir. 1995) (applying the three-part test directly to the regulation in issue); also *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 844 F.2d 714, 724 (10th Cir. 1988) ("In at least some instances, violations of rights provided under federal regulations provide a basis for § 1983 suits."); and *Samuels v. District of Columbia*, 770 F.2d 184 (D.C. Cir. 1985).

Of the remaining circuits, only the Fourth has even arguably deviated from the majority, stating in *Smith v. Kirk*, 821 F.2d 980, 984 (4th Cir. 1987) that "[a]n administrative regulation . . . cannot create an enforceable § 1983 right not already implicit in the statute". The Fifth Circuit appears undecided on the issue. *See Gracia v. Brownsville Hous.*, 105 F.3d 1053, 1057 (5th Cir. 1997) ("[I]t is not clear that regulations can be considered 'laws' for purposes of creating a right actionable under section 1983."), *cert. denied*, 522 U.S. 865, 118 S.Ct. 171, 139 L.Ed. 2d 114 (1997). The Second Circuit apparently has not yet confronted the issue. As such, the maverick decision of the Eleventh Circuit stands alone, and continues to suppress civil rights litigants in the three states encompassed by that Circuit.[2]

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[2] The dissent in *Harris* contains a more emphatic, thorough, and complete denunciation of the Eleventh Circuit's majority decision.

IV. A federal civil right exists, for 1983 purposes, even if it is based solely on a valid regulation having the force of law. Alternatively, an enforceable right certainly exists if the statute and the regulation together create such a right.

In *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed. 2d 781 (1987), this Court specifically relied upon the Department of Housing and Urban Development's interpretation of the term "rent" in fashioning a federal right ("HUD has consistently considered 'rent' to include a reasonable amount for the use of utilities" 479 U.S. at 420, 107 S.Ct. at 768). Although this Honorable Court has not squarely addressed the issue, footnote 3 of the majority's opinion in *Wright* states in part: "[t]he dissent may have a different view, but to us it is clear that the regulations gave low-income tenants an enforceable right to a reasonable utility allowance and that the regulations were fully authorized by the statute." *Wright* at 479 U.S. 418, 420, 107 S.Ct. 766, 769. The regulations . . . defining the statutory concept of "rent" as including utilities, have the force of law. . . . *Id.* at 479 U.S. 418, 431, 107 S.Ct. 766, 774.

In *Guardians Ass'n v. Civil Service Com'n of City of New York*, 463 U.S. 582, 103 S.Ct. 3221 (1983), the issue was addressed by the dissent, which stated that:

> [I]t is clear that the § 1983 remedy is intended to redress the deprivation of rights secured by all valid federal laws, including statutes and regulations having the force of law. *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed. 2d 555 (1980). [FN6] *See also Cannon, supra*, 441 U.S.,

at 722-724, 99 S.Ct., at 1970-1972 (WHITE, J., dissenting); *ante*, at 3226.

FN6. *Thiboutot* itself involved only federal statutes, not regulations. Its analysis of § 1983, however, applies equally to administrative regulations having the force of law. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 301-303, 99 S.Ct. 1705, 1717-1718, 60 L.Ed. 2d 208 (1979) (discussing what types of administrative regulations have "the force and effect of law"). *Guardians* at U.S. 638, S. Ct. 3251.

The recreational boating access regulation at issue in the instant case was promulgated by the United States Department of the Interior. It has the force of law and should not be discounted simply because the right itself may not be explicitly laid out in the statute. The Ninth Circuit in *Buckley* found that the regulation created an enforceable right in a straightforward application of this Court's well-accepted test. That test simply requires consideration of the statute and the regulation together. The continued proliferation of any other test causes inequality among similarly situated litigants, and deserves the attention of this Honorable Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-13951

D.C. Docket No. 99-00335-CV-T-17E

KISSIMMEE RIVER VALLEY
SPORTSMAN ASSOCIATION,

Plaintiff-Appellant,

versus

CITY OF LAKELAND,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(Filed May 10, 2001)

Before ANDERSON, Chief Judge, and EDMONDSON and RONEY, Circuit Judges.

ANDERSON, Chief Judge:

The Kissimmee River Valley Sportsman Association appeals the district court's dismissal of its complaint for failure to state a claim. For the reasons stated below, we affirm.

On February 12, 1999, the Kissimmee River Valley Sportsman Association,[1] brought suit under 42 U.S.C. § 1983 against the aptly named City of Lakeland, seeking injunctive and declaratory relief from a city ordinance. The ordinance, section 58-32 of the Lakeland City Code, prohibits the operation of any airboat upon any of the lakes within the city. The Plaintiff claimed that the ordinance violates the Federal Aid in Sport Fish Recreation Act (the "Act"), 16 U.S.C. §§ 777-777k, and the regulations promulgated under it. In particular, it claimed that the Act and regulations create a federal right of equal access for boats with common horsepower ratings and that this right was infringed upon by the airboat restriction. Relying on *Harris v. James*, 127 F.3d 993 (11th Cir. 1997), the district court concluded that the Act does not create this right and dismissed the complaint. We address the narrow issue of whether the Act and regulations create such a federal right of equal access which may be enforced in an action under § 1983.

We review *de novo* a dismissal for failure to state a claim, applying the same standard used by the district court. *United States v. Pemco Aeroplex, Inc.*, 195 F.3d 1234, 1236 (11th Cir. 1999) (en banc). We must accept the allegations set forth in the complaint as true for purposes of a motion to dismiss. *See id.*

The Plaintiff argues that it and its members have a federal right of equal boating access to the Lakeland lakes regardless of the type of boat used and that Lakeland's

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[1] This association is a group of approximately 150 recreational boaters and fishermen who use the public lands in and around Lakeland for recreational purposes.

ordinance prohibiting airboats violates this right. The Plaintiff argues that this right can be found in the Act and the Act's interpretative regulations. The Act provides funds for fish restoration and management projects to coastal states including Florida. States desiring such funds must prepare and submit "a comprehensive fish and wildlife resource management plan which shall insure the perpetuation of these resources for the economic, scientific, and recreational enrichment of the people." 16 U.S.C. § 777e(a)(1). The Secretary of the Interior is authorized to finance up to 75% of such plans. *See id.* The Act requires Florida to spend 15% of funds received through the Act on "the acquisition, development, renovation, or improvement of facilities . . . that create, or add to, public access to the waters of the United States to improve the suitability of such waters for recreational boating purposes." 16 U.S.C. § 777g(b)(1). To establish the right of equal access, the Plaintiff points in particular to 50 C.F.R. § 80.24, which provides in relevant part:

> The State shall allocate at least 10 percentum of each annual apportionment under Federal Aid in Sport Fish Restoration Act for recreational boating access facilities. *All facilities constructed, acquired, developed, renovated, or maintained (including those existing structures for which maintenance is provided) must be for the purpose of providing additional, improved, or safer access of public waters for boating recreation* as part of the State's effort for the restoration, management, and public use of sport fish. Though a broad range of access facilities and associated amenities can qualify for funding under the 10 percent provision, *power boats with common horsepower ratings must be accommodated*, and, in addition,

> the State must make reasonable efforts to accommodate boats with larger horsepower ratings if they would not conflict with aquatic resources management.

(emphasis added). This regulation, the Plaintiff argues, binds recipients of federal funding because 50 C.F.R. § 80.3 provides that "[a] State may participate in the benefits of the Act[ ] only after it has passed legislation which assents to the provisions of the Act[ ] . . . " and the State of Florida has so assented. *See* Fla. Stat. Ann. § 372.7701 (West 2000) ("The state hereby assents to the provisions of the Federal Aid in Fish Restoration Act of August 9, 1950, as amended."). The Plaintiff claims that boat launch facilities in the City of Lakeland received federal funds under the Act and therefore the city is bound by these regulations. The Plaintiff contends that the statute providing for public access, in conjunction with the regulation requiring access facilities to accommodate boats with common horsepower ratings, creates a federal right of equal access for boats with common horsepower ratings. For purposes of this appeal only, we assume *arguendo,* but expressly do not decide, that the regulation purports to require equal access for boats with common horsepower ratings.[2]

---

[2] We express considerable doubt that the regulations should be construed to require equal accommodation of airboats, because the regulations appear to require accommodation only of boats that are suitable for a particular body of water. *See* 50 C.F.R. § 80.1(1) ("Common horsepower is defined as any size motor that can be reasonably accommodated on the body of water slated for development."). In light of our holding, however, we do not have to decide the meaning of the regulations.

Like the district court, we begin our analysis with *Harris v. James*, 127 F.3d 993 (11th Cir. 1997). *Harris* involved a regulation, binding on all States participating in Medicaid, requiring State plans to specify that the Medicaid agency will ensure necessary transportation for recipients to and from providers. In *Harris*, we rejected the approach of finding an enforceable " 'federal right' in any regulation that in its own right meets the three-prong 'federal rights' test."[3] *Id.* at 1008. We also rejected the approach of "finding enforceable rights in any valid administrative interpretation of a statute that creates some enforceable right." *Id.* Rather, we concluded that "if the regulation goes beyond explicating the specific content of the statutory provision and imposes distinct obligations in order to further the broad objectives underlying the statutory provision, we think the regulation is too far removed from Congressional intent to constitute a 'federal right' enforceable under § 1983." *Id.* at 1009. Ultimately, in *Harris*, we concluded that "the nexus between the regulation and Congressional intent to create federal rights is simply too tenuous to create an enforceable right to transportation." *Id.* at 1010.

Turning to the instant case, we think it likewise lacks the necessary nexus. As noted above, the Act itself only requires States to spend 15% of funds received through the Act on facilities that "create, or add to, public access

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[3] In *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509, 110 S.Ct. 2510, 2517 (1990), the Supreme Court set out this three-prong test: (1) is the provision intended to benefit the plaintiff? (2) does the provision impose a binding obligation on the governmental unit? and (3) is the interest too vague and amorphous for judicial enforcement?

to the waters of the United States to improve the suitability of such waters for recreational boating purposes." 16 U.S.C. § 777g(b)(1). The regulation at issue has two parts. First, the regulation provides that 10% of these funds be allocated for recreational boating access facilities. *See* 50 C.F.R. § 80.24. Second, the regulation states, "Though a broad range of access facilities and associated amenities can qualify for funding under the 10 percent provision, power boats with common horsepower ratings must be accommodated, and, in addition, the State must make reasonable efforts to accommodate boats with larger horsepower ratings if they would not conflict with aquatic resources management." *Id.* The Plaintiff's argument for equal access for airboats with comparable horsepower ratings is necessarily grounded in this second part of the regulation because neither the Act itself nor other parts of the regulations suggest equal accommodation of power boats with common horsepower ratings. Although the Act may well contemplate improvement of access generally for recreational boating, it does not create an equal access right. The part of the regulation, which Plaintiff contends does so, is too far removed from Congressional intent to create this enforceable right itself.

Indeed, we believe that this conclusion follows *a fortiori* from *Harris v. James*. There, a provision of the Medicaid Act required that medical assistance "shall be furnished with reasonable promptness" and also included a provision requiring comparable medical assistance as between the "categorically needy" and the "medically needy." *Harris*, 127 F.3d at 1011. We held that the regulation requiring the States to provide necessary

transportation for Medicaid recipients to and from providers was too far removed from the Congressional intent (either with respect to prompt delivery of medical assistance or with respect to requiring comparable assistance) to create an enforceable right under § 1983. *See id.* at 1012. The regulation in the instant case – which we assume *arguendo* requires equal access for boats with common horsepower ratings – bears an even more tenuous relationship to the statutory provision – which requires only that funds be spent on facilities that "create, or add to, public access to the waters of the United States to improve the suitability of such waters for recreational boating purposes." 16 U.S.C. § 777g(b)(1). Nothing in the statute suggests a right based on equality or comparability. In fact, even more clearly than in *Harris*, the instant regulation imposes new and "distinct obligations" not found in the statute itself, and thus is "too far removed from the Congressional intent to constitute a 'federal right' enforceable under § 1983." *Harris*, 127 F.3d at 1009. The instant regulation goes far beyond merely further defining or fleshing out the context of any "federal right" found in the statute itself. *Id.*

Thus, we hold that the right of equal access that the Plaintiff wishes to enforce under § 1983 is not a federal right so enforceable. Accordingly, we conclude that the Plaintiff has failed to state a claim.[4]

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[4] The Plaintiff points to the holding of *Buckley v. City of Redding, Cal.*, 66 F.3d 188 (9th Cir. 1995). In *Buckley*, the Ninth Circuit held that the Act does confer a right of equal access for power boats with common horsepower ratings enforceable under § 1983. We do not find this case persuasive here. The Ninth Circuit apparently applied the three-prong test, *see supra*

For the reasons stated above, we **AFFIRM.**

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note 3, exclusively to the regulations promulgated under the Act, 50 C.F.R. §§ 80.3, 80.5(b), 80.21, and 80.24, and concluded that they created the enforceable right. *See id.* at 192. This is the very approach rejected in *Harris*. *See Harris*, 127 F.3d at 1008. The Plaintiff emphasizes the reasoning of *Buckley* that the State's obligation to follow the regulations was contractual in nature and therefore created the enforceable right. *See Buckley*, 66 F.3d at 192 ("The state's obligation is in the nature of a contract and is clearly binding."). Even if the regulations are binding, they do not necessarily create a right enforceable through § 1983. The *Harris* Court recognized that the regulation may be a valid interpretation of the Congressionally enacted provisions while still being too far removed to support a conclusion that Congress has unambiguously conferred a federal right enforceable under § 1983. *See Harris*, 127 F.3d at 1012. Additionally, the Ninth Circuit, unlike the *Harris* Court, did not have the benefit of *Blessing v. Freestone*, 520 U.S. 329, 117 S.Ct. 1353 (1997), the Supreme Court's latest case in this area.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

KISSIMMEE RIVER VALLEY SPORTSMAN ASSOCIATION,

Plaintiff,

v.

THE CITY OF LAKELAND,

Defendant.
_____/

CASE NO. 99-335-CIV-T-17E
(Filed Aug. 17, 1999)

ORDER ON DEFENDANT'S MOTION TO DISMISS

This cause comes before the Court on Defendant CITY OF LAKELAND's amended motion to dismiss and supporting memorandum (Docket Nos. 7-8); and Plaintiff KISSIMMEE RIVER VALLEY SPORTSMANS ASSOCIATION's response (Docket No. 13).

STANDARD OF REVIEW

Plaintiff's complaint should not be dismissed under Rule 12(b)(6) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45 (1957). The Court must also accept the plaintiff's well-pleaded facts as true and construe the complaint in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In deciding a motion to dismiss, a court can examine only the four corners of the complaint.

Rickman v. Precisionaire, Inc., 902 F. Supp. 232 (M.D. Fla. 1995). The threshold of sufficiency that a complaint must meet to survive a motion to dismiss is exceedingly low. *Ancata v. Prison Health Servs.*, 769 F.2d 700, 703 (11th Cir. 1985). However, when, on the basis of a dispositive issue of law, no construction of the factual allegations of a complaint will support the cause of action, dismissal of the complaint is appropriate. *Powell v. United States*, 945 F.2d 374 (11th Cir. 1991); *Executive 100, Inc. v. Martin County*, 922 F.2d 1536 (11th Cir. 1991).

BACKGROUND

I. Federal Statutory Framework

The Federal Aid in Sportfish Recreation Act, 16 U.S.C. § 777a-k, [hereinafter "the Act"] apportioned funds for fish restoration and management projects to coastal states, including Florida. § 777(b). The Act defines "fish restoration and management projects" as "projects designed for restoration and management of all species of fish which have material value in connection with sport or recreation in the marine and/or fresh waters of the United States." 16 U.S.C. § 777a(1).

To become eligible to receive funds under the Act, a state must submit "a comprehensive fish and wildlife management plan which shall insure the perpetuation of those resources for the economic, scientific, and recreational enrichment of the people." 16 U.S.C. § 777e(1). States are required to allocate fifteen (15) percent of the funds allocated under the Act to "acquisition, development, renovation, or improvement of facilities . . . that create, or add to, public access to the waters of the United

States to improve the suitability of such waters for recreational boating purposes." 16 U.S.C. § 777g(b).

The regulations promulgated by the Department of the Interior pursuant to the Act require states to allocate at least ten (10) percent of the funds apportioned for "recreational boating access facilities." 50 C.F.R. § 80.24. The regulation further requires that the facilities must accommodate "power boats with common horsepower ratings" and "must make reasonable efforts to accommodate boats with larger horsepower ratings if they would not conflict with aquatic resources management." *Id.*

II. Facts

The facts as stated are taken from the complaint (Docket No. 1). Plaintiff Kissimmee River Valley Sportsmans Association [hereinafter "the Association"] is a group of recreational boaters and fisherman. One of the Association's stated purposes is to educate its members and the general public about protecting and preserving public access to navigable lakes, rivers, streams, and all public lands for traditional recreational uses such as hunting, fishing, boating, camping, and hiking.

The Association challenges the legality of Lakeland City Code Section 58-32, which states that "[i]t shall be unlawful for any person to operate any airboat upon any of the lakes within the city," with certain exceptions for governmental agencies. Section 58-32 goes on to define "airboat" as "any boat, sled, sea skiff, or swamp boat pushed, pulled or propelled by air power generated by a motor of more than 25 horsepower." The ordinance was

passed by the Lakeland City Commission on April 1, 1985, and states that it was passed in recognition of the fact that the level of noise generated by airboats creates a nuisance and is a danger to people and wildlife. *See* Proposed Ordinance No. 85-56.

The Association alleges that the Act and its interpretative regulations create an enforceable federal statutory right for equal access for boats of common horsepower ratings at boat launch facilities constructed or maintained under the Act. It further alleges that the airboats used by its members are power boats with common horsepower ratings. The Association alleges that its members have suffered an actual injury because of Section 58-32, in that its members have been prevented from using their airboats on the bodies of water covered by the Act, and that at least one of its members has been arrested and charged with violating that code section.

Count I of the complaint is a claim under 42 U.S.C. Section 1983, alleging that Section 58-32 deprives the members of the Association of its federal statutory rights under the Act and the regulations promulgated pursuant to the Act. The Association also brings several pendant state law claims. Count II is a claim for declaratory relief, alleging that Section 58-32 is expressly prohibited by Section 327.02, Florida Statutes. Count III is a claim for declaratory relief, alleging that section 58-32 conflicts with Section 372.7701, Florida Statutes. Count IV is a claim for declaratory relief, alleging that the subject matter of Section 58-32 is expressly preempted by Section 327.60, Florida Statutes.

ANALYSIS

Defendant City of Lakeland [hereinafter "the City"] moves for dismissal of Count I of the complaint on the following grounds: (1) the Act does not create a federal right enforceable under Section 1983, (2) the Act does not apply to municipalities, (3) the complaint fails to allege that Lakeland received federal funds pursuant to the Act or otherwise assented to the Act's provisions, and (4) the claim was not brought within the applicable statute of limitations. The Court finds it necessary to address only the first of these grounds, because Supreme Court and Eleventh Circuit caselaw requires a holding that the Act does not create a federal right enforceable under Section 1983.

The Association argues that the Act and the regulations promulgated pursuant to the Act create a federal right enforceable under Section 1983. The Association relies on *Buckley v. City of Redding*, 66 F.3d 188 (9th Cir. 1995), in which the Ninth Circuit concluded that such a right was created. The Ninth Circuit applied the following test, set forth in *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990):

> (1) whether the statutory provision at issue was intended to benefit the putative plaintiff; (2) whether the provision creates a binding obligation on the state rather than a mere congressional preference; and (3) whether the asserted interest is not so amorphous as to be beyond the competence of the judiciary to enforce.

Buckley, 66 F.3d at 190 (citing *Wilder*, 496 U.S. at 509).

The City argues that the Ninth Circuit's holding in *Buckley* is not consistent with the test set forth in the Eleventh Circuit case *Harris v. James*, 127 F.3d 993 (11th Cir. 1997), for determining when an interpretive regulation creates a federal right. Significantly, the *Buckley* court found an enforceable right based on the regulations interpreting the Act, rather than on the Act itself, but did not consider whether the statute itself created a federal right. The City further points out that at the time of its decision in *Buckley*, the Ninth Circuit did not have the benefit of the Supreme Court's decision in *Blessing v. Freestone*, 520 U.S. 329 (1997), on which the Eleventh Circuit relied in part for its decision in *Harris*.

In *Blessing*, the Supreme Court considered whether the provision of the Social Security Act requiring that each state must operate a child support enforcement program, known as Title IV-D, creates an enforceable right "to have the State's program achieve 'substantial compliance' with those provisions." *Id.* at 333. The Court held that the lower court had erred in finding the existence of such a right based on the statute because the requirement that states achieve substantial compliance with Title IV-D did not create an "*individual* entitlement to services," but was a means to "measure the *systemwide* performance of a State's Title IV-D program." *Id.* at 343 (emphasis in original). Nor did the regulations interpreting Title IV-D to require "sufficient staff to fulfill certain functions" create an enforceable right, the Court held. *Id.* at 345. The Court stated that the link between the requirements of the regulation and "the services provided to any particular individual is far too tenuous to support the notion that Congress meant to give each and every Arizonian who is

eligible for Title IV-D the right to have the State Department of Economic Security staffed at a 'sufficient' level." *Id.*

In *Harris*, the Eleventh Circuit considered "whether Medicaid recipients have a federal right to transportation which may be enforced in an action under § 1983." 127 F.3d at 996. Like the issue before this Court, that question required the *Harris* court to consider whether the regulations interpreting a federal statute created an enforceable right. *See id.* at 1005. The *Harris* court acknowledged that there is a split in the circuits on this issue, but stated that in its view, "the driving force behind the Supreme Court's case law in this area is a requirement that courts find a Congressional intent to create a particular federal right." *Id.* at 1008. The court therefore rejected the approach of "finding enforceable rights in any valid administrative interpretation of a statute that creates some enforceable right." *Id.* It recognized that "so long as the statute itself confers a specific right upon the plaintiff, and a valid regulation merely further defines or fleshes out the content of that right, then the statute . . . may create a federal right as further defined by the regulation." *Id.* at 1009. In contrast, however:

> if the regulation defines the content of a statutory provision that creates no federal right under the three-prong test [developed in *Wilder* and *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987)], or if the regulation goes beyond explicating the specific content of the statutory provision and imposes distinct obligations in order to further the broad objectives underlying the statutory provision, we think the regulation is too far removed from

> Congressional intent to constitute a "federal right" enforceable under § 1983.

127 F.3d at 1009.

In *Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998), the Eleventh Circuit considered whether developmentally delayed Medicaid recipients have a enforceable federal right to have Medicaid assistance furnished with reasonable promptness. In that case, the Eleventh Circuit distinguished the case before it from *Harris*. The *Doe* court noted that the source of the right addressed in *Harris* was a federal regulation, while the question before it involved a right created by a federal statute. *Doe*, 136 F.3d at 714-15. It stated that the statutory provision at issue "presents a sufficiently specific and definite standard readily susceptible to judicial assessment." *Id.* at 717. The regulations interpreting the statute "further define[d] the contours of the statutory right." *Id.*

The question this Court must resolve is whether the Act itself creates a right which the regulation in question merely "fleshes out" or "defines the contours of," or whether the regulation instead imposes "distinct obligations in order to further the broad objectives underlying" the Act. The Association states that the Act was intended to benefit sport fishermen by improving public access to navigable public waters, and that the regulation defines the contours of this right by requiring that power boats be accommodated facilities created pursuant to the Act. The Association argues that the statute thus confers a right of public access for "sport fisherman utilizing state waters serviced by federally funded boat launch facilities." (Pl. Resp. at 8).

The Association's argument is not consistent with the Supreme Court and Eleventh Circuit caselaw on this issue. The Association concedes that the Act itself does not grant public access to the waters involved, but instead provides funds so that the waters may be improved for recreational uses. The link between the statute's provision of funds for boating facilities and the regulation's requirement that the facilities accommodate all power boats with motors of a particular size is too remote for the Court to assume that Congress intended to create the right of access for which the Association argues. *See Blessing*, 520 U.S. at 345.

Requiring the accommodation of power boats may further the broad objective of the Act by allowing the improved waters to support a full range of recreational uses. The regulation is not, however, merely the "fleshing out" of a right created by the Act. Under the test set forth in *Harris*, therefore, the statute under which the Association seeks to bring its Section 1983 action does not create an enforceable federal right. That claim will therefore be dismissed.

The Court would further note that it is not clear that even the regulation itself grants the right of access for which the Association argues. The regulation requires that boat launch facilities created with funds apportioned by the Act accommodate power boats with common horsepower ratings. While the interpretation of this regulation is not a question before the Court, the language of the regulation seems to the Court to be directed at the appropriate scale and type of boat launch facilities to be

funded under the Act. It does not appear to forbid ordinances limiting or prohibiting the use of types of power boats that may create a nuisance or a hazard.

The City further moves for dismissal of the pendant state claims if Count I is dismissed. Dismissal of these claims is appropriate, because they present no federal questions and diversity does not exist. Accordingly, it is

ORDERED that Plaintiff's Complaint be **DISMISSED** with prejudice.

DONE AND ORDERED in Chambers, in Tampa, Florida this 17th day of August, 1999.

/s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
Chief United States District Judge

Copies to: All parties and counsel of record

STATUTES AND REGULATIONS INVOLVED IN THE CASE

TITLE 16. CONSERVATION
CHAPTER 10B – FISH RESTORATION AND MANAGEMENT PROJECTS

§ 777. Federal-State relationships

(a) Cooperation between Federal Government and State fish and game departments; expenditure of funds

The Secretary of the Interior is authorized and directed to cooperate with the States through their respective State fish and game departments in fish restoration and management projects as hereinafter set forth: No money apportioned under this chapter to any State, except as hereinafter provided, shall be expended therein until its legislature, or other State agency authorized by the State constitution to make laws governing the conservation of fish, shall have assented to the provisions of this chapter and shall have passed laws for the conservation of fish, which shall include a prohibition against the diversion of license fees paid by fishermen for any other purpose than the administration of said State fish and game department, except that, until the final adjournment of the first regular session of the legislature held after passage of this chapter, the assent of the governor of the State shall be sufficient. The Secretary of the Interior and the State fish and game department of each State accepting the benefits of this chapter shall agree upon the fish restoration and management projects to be aided in such State under the terms of this chapter, and all projects shall conform to the standards fixed by the Secretary of the Interior.

(b) Allocation of amounts by coastal States between marine fish projects and freshwater fish projects

(1) In general

Subject to paragraph (2), *each coastal State, to the extent practicable, shall equitably allocate amounts apportioned to such State under this chapter between marine fish projects and freshwater fish projects in the same proportion as the estimated number of resident marine anglers and the estimated number of resident freshwater anglers, respectively, bear to the estimated number of all resident anglers in that State.*

(2) Preservation of freshwater project allocation at 1988 level

(A) Subject to subparagraph (B), the amount allocated by a State pursuant to this subsection to freshwater fish projects for each fiscal year shall not be less than the amount allocated by such State to such projects for fiscal year 1988.

(B) Subparagraph (A) shall not apply to a State with respect to any fiscal year for which the amount apportioned to the State under this chapter is less than the amount apportioned to the State under this chapter for fiscal year 1988.

(3) "Coastal State" defined

As used in this subsection, the term "coastal State" means any one of the States of Alabama, Alaska, California, Connecticut, Delaware, *Florida,* Georgia, Hawaii, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Oregon, Rhode Island, South Carolina, Texas, Virginia, and Washington. The term also includes the Commonwealth

of Puerto Rico, the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

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§ 777g. Maintenance of projects

(a) Duty of States; status of projects; title to property

To maintain fish-restoration and management projects established under the provisions of this chapter shall be the duty of the States according to their respective laws. Beginning July 1, 1953, maintenance of projects heretofore completed under the provisions of this chapter may be considered as projects under this chapter. Title to any real or personal property acquired by any State, and to improvements placed on State-owned lands through the use of funds paid to the State under the provisions of this chapter, shall be vested in such State.

(b) Funding requirements

(1) *Each State shall allocate 15 percent of the funds apportioned to it for each fiscal year under section 777c of this title for the payment of up to 75 per centum of the costs of the acquisition, development, renovation, or improvement of facilities (and auxiliary facilities necessary to insure the safe use of such facilities) that create, or add to, public access to the waters of the United States to improve the suitability of such waters for recreational boating purposes.* Notwithstanding this provision, States within a United States Fish and Wildlife Service Administrative Region may allocate more or less than 15 percent in a fiscal year, provided that

the total regional allocation averages 15 percent over a 5 year period.

(2) So much of the funds that are allocated by a State under paragraph (1) in any fiscal year that remained unexpended or unobligated at the close of such year are authorized to be made available for the purposes described in paragraph (1) during the succeeding four fiscal years, but *any portion of such funds that remain unexpended or unobligated at the close of such period are authorized to be made available for expenditure by the Secretary of the Interior in carrying out the research program of the Fish and Wildlife Service in respect to fish of material value for sport or recreation.*

(c) Aquatic resource education program; funding, etc.

Each State may use not to exceed 15 percent of the funds apportioned to it under section 777c of this title to pay up to 75 per centum of the costs of an aquatic resource education and outreach and communications program for the purpose of increasing public understanding of the Nation's water resources and associated aquatic life forms. The non-Federal share of such costs may not be derived from other Federal grant programs. The Secretary shall issue not later than the one hundred and twentieth day after the effective date of this subsection such regulations as he deems advisable regarding the criteria for such programs.

(d) National outreach and communications program

(1) Implementation

Within 1 year after June 9, 1998, *the Secretary of the Interior shall develop and implement, in cooperation and consultation*

with the Sport Fishing and Boating Partnership Council, a national plan for outreach and communications.

(2) Content

The plan shall provide –

(A) guidance, including guidance on the development of an administrative process and funding priorities, for outreach and communications programs; and

(B) for the establishment of a national program.

(3) Secretary may match or fund programs

Under the plan, the Secretary may obligate amounts available under subsection (c) or (d) of section 777c of this title –

(A) to make grants to any State or private entity to pay all or any portion of the cost of carrying out any outreach and communications program under the plan; or

(B) to fund contracts with States or private entities to carry out such a program.

(4) Review

The plan shall be reviewed periodically, but not less frequently than once every 3 years.

(e) State outreach and communications program

Within 12 months after the completion of the national plan under subsection (d)(1) of this section, *a State shall develop a plan for an outreach and communications program and submit it to the Secretary. In developing the plan, a State shall* –

(1) review the national plan developed under subsection (d) of this section;

(2) *consult with anglers, boaters, the sportfishing and boating industries, and the general public;* and

(3) establish priorities for the State outreach and communications program proposed for implementation.

(f) Pumpout stations and waste reception facilities

Amounts apportioned to States under section 777c of this title may be used to pay not more than 75 percent of the costs of constructing, renovating, operating, or maintaining pumpout stations and waste reception facilities (as those terms are defined in the Clean Vessel Act of 1992).

(g) Surveys

(1) National framework

Within 6 months after June 8, 1998, *the Secretary, in consultation with the States, shall adopt a national framework for a public boat access needs assessment which may be used by States to conduct surveys to determine the adequacy, number, location, and quality of facilities providing access to recreational waters for all sizes of recreational boats.*

(2) State surveys

Within 18 months after June 8, 1998, each State that agrees to conduct a public boat access needs survey following the recommended national framework shall report its findings to the Secretary for use in the development of a comprehensive national assessment of recreational boat access needs and facilities.

(3) Exception

Paragraph (2) does not apply to a State if, within 18 months after June 8, 1998, the Secretary certifies that the State has developed and is implementing a plan that ensures there are and will be public boat access adequate to meet the needs of recreational boaters on its waters.

(4) Funding

A State that conducts a public boat access needs survey under paragraph (2) may fund the costs of conducting that assessment out of amounts allocated to it as funding dedicated to motorboat access to recreational waters under subsection (b)(1) of this section.

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§ 777i. Rules and regulations

The Secretary of the Interior is authorized to make rules and regulations for carrying out the provisions of this chapter.

TITLE 50 – WILDLIFE AND FISHERIES CHAPTER I – UNITED STATES FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR PART 80 – ADMINISTRATIVE REQUIREMENTS, FEDERAL AID IN FISH AND FEDERAL AID IN WILDLIFE RESTORATION ACTS –

80.3 Assent legislation. A State may participate in the benefits of the Act(s) only after it has passed legislation

which assents to the provisions of the Acts and has passed laws for the conservation of fish and wildlife including a prohibition against the diversion of license fees paid by hunters and sport fishermen to purposes other than administration of the fish and wildlife agency. Subsequent legislation which amends these state laws shall be subject to review by the Secretary. If the legislation is found contrary to the assent provisions, the State shall become ineligible.

80.21 Assurances. The State must agree to and certify that it will comply with all applicable Federal laws, regulations, and requirements as they relate to the application, acceptance, and use of Federal funds under the Acts. The Secretary shall have the right to review or inspect for compliance at any time. Upon determination of noncompliance, the Secretary may terminate or suspend those projects in noncompliance, or may declare the State ineligible for further participation in program benefits until compliance is achieved.

80.24 Recreational boating access facilities. The State shall allocate at least 10 percentum of each annual apportionment under Federal Aid in Sport Fish Restoration Act for recreational boating access facilities. All facilities constructed, acquired, developed, renovated, or maintained (including those existing structures for which maintenance is provided) must be for the purpose of providing

additional, improved, or safer access of public waters for boating recreation as part of the State's effort for the restoration, management, and public use of sport fish. Though a broad range of access facilities and associated amenities can qualify for funding under the 10 percent provision, power boats with common horsepower ratings must be accommodated, and, in addition, the State must make reasonable efforts to accommodate boats with larger horsepower ratings if they would not conflict with aquatic resources management. Any portion of the 10 percent set aside for the above purposes that remains unexpended or unobligated after two years shall revert to FWS.

WEST'S FLORIDA STATUTES ANNOTATED TITLE XXVIII. NATURAL RESOURCES; CONSERVATION, RECLAMATION, AND USE

CHAPTER 372. WILDLIFE

372.7701. Assent to federal acts

(1) *The state hereby assents to the provisions of the Federal Aid in Fish Restoration Act of August 9, 1950, as amended. The Fish and Wildlife Conservation Commission shall perform such activities as are necessary to conduct wildlife and sport-fish restoration projects, as defined in such Act of Congress and in compliance with the act and rules adopted thereunder by the United States Department of the Interior.* Furthermore, the commission shall develop and implement programs to manage, protect, restore, and conserve marine mammals and the marine fishery and shall develop and

implement similar programs for wild animal life and freshwater aquatic life.

(2) Revenues from fees paid by hunters and sport fishers may not be diverted to purposes other than the administration of fish and wildlife programs by the Fish and Wildlife Conservation Commission. Administration of the state fish and wildlife programs includes only those functions of fish and wildlife management as are the responsibility of and under the authority of the Fish and Wildlife Conservation Commission.

(3) This section shall be construed in harmony with s. 372.77.

Patrick **BUCKLEY**; Personal Watercraft,
Plaintiffs-Appellants,

v.

CITY OF **REDDING**, CALIFORNIA,
a Municipal Corporation,
Defendant-Appellee.

No. 93-17277.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 15, 1995.

Decided Sept. 13, 1995.

As Amended on Denial of Rehearing
and Suggestion for Rehearing
En Banc Nov. 30, 1995*

Sharon K. Sandeen, Downey, Brand, Seymour & Rowher, Sacramento, CA, for plaintiffs-appellants.

Walter P. McNeill, Law Offices of Walter P. McNeill, Redding, CA, and Bradley N. Webb, Wilke, Fleury, Hoffelt, Gould & Birney, Sacramento, CA, for defendant-appellee.

Appeal from the United States District Court for the Eastern District of California.

Before: HUG, ALARCON, and TROTT, Circuit Judges.

HUG, Circuit Judge:

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* Judges Hug and Trott have voted to reject the suggestion for rehearing en banc, and Judge Alarcon has recommended rejection of the suggestion for rehearing en banc.

In this case, we must determine whether the Federal Aid in Sport Fish Restoration Act ("the Act"), 16 U.S.C. §§ 777-777k, confers a right enforceable under 42 U.S.C. § 1983 to access certain waterways for specified recreational purposes. We hold that the Act does confer rights enforceable under section 1983 and, accordingly, reverse the district court's decision to the contrary.

FACTS

The City of Redding, California, is located on the Sacramento River. In 1990, in response to a citizen petition, the City passed Ordinance No. 1944, prohibiting the operation of personal watercraft in the Sacramento River. *See* Redding Mun.Code § 10.26.040. The ordinance defines personal watercraft as:

> any motorized vessel which has an internal combustion engine powering a water-jet pump or a fully-covered propeller chamber as its primary source of motor propulsion, and which is designed to be operated by a person sitting, standing, or kneeling on the vessel rather than the conventional manner of sitting or standing inside the vessel. The term shall include those vessels commonly known as "Jet Skis," "Wet Bikes," "Surf Jets," and "Sea Doo."

Redding Mun.Code § 10.26.020(B).

In 1990, the State received funds under the Federal Aid in Sport Fish Restoration Act to help construct a boat launch facility on the river at South Bonnyview Road. To receive this funding, the state assented to the regulations and provisions of the Act. 50 C.F.R. § 80.3. The Act imposes a number of requirements upon fund recipients

to further the purposes of the Act. 50 C.F.R. § 80.24 states that at least ten percent of the funds allocated to a state under the Act must be used "for recreational boating access facilities." This regulation further states:

> All facilities constructed, acquired, developed, renovated, or maintained . . . must be for the purpose of providing additional, improved, or safer access of public waters for boating recreation as part of the State's effort for the restoration, management, and public use of sport fish. Though a broad range of access facilities and associated amenities can qualify under the 10 percent provision, *power boats with common horsepower ratings must be accommodated,* and, in addition, the State must make reasonable efforts to accommodate boats with larger horsepower ratings if they would not conflict with aquatic resources management.

50 C.F.R. § 80.24 (emphasis added).

Patrick Buckley and the Personal Watercraft Industry Association ("PWIA") filed suit in state court arguing that the City's restriction of the Sacramento River violated the Act by unfairly singling out personal watercraft for differential treatment.[1] The state court denied the plaintiffs' motion for summary judgment and the action

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[1] The parties do not contest that Jet Skis, Sea Doo's and other personal watercraft affected by the Ordinance constitute motorboats within the meaning of the Act. The United States Coast Guard classifies personal watercraft as Class A motorboats. 46 C.F.R. § 24.10-17. Likewise, the California Attorney General recognized this classification in an opinion issued in response to the City of Redding's inquiry into the validity of its ordinance. *See* 74 Op. Att'y Gen. 174 (1991).

was later dismissed voluntarily. Buckley and the PWIA then filed the present action in federal district court seeking to enforce this provision of the Act via 42 U.S.C. § 1983.[2] The district court refused to exercise pendent jurisdiction over the related state law claims and dismissed the plaintiffs' action under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The district court held that the plaintiffs could not bring an action under section 1983 because the Act does not confer an enforceable federal right. The parties appealed and we have jurisdiction pursuant to 28 U.S.C. § 1291.

STANDARD OF REVIEW

We review *de novo* a district court's decision to grant a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.1990).

DISCUSSION

"Section 1983 provides a cause of action for the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 508, 110 S.Ct. 2510, 2516, 110 L.Ed.2d 455 (1990). It is well settled that section 1983 "provides a cause of action for violations of federal statutes as well as the Constitution." *Id.* Section 1983 is broad, providing as a general rule, a

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[2] The parties have also filed a second action in state court, the proceedings of which have been stayed pending the outcome of this appeal.

mechanism to enforce constitutional or statutory rights, with two exceptions. A plaintiff will not be permitted to bring a section 1983 action if (1) the statute does not create an enforceable right, privilege, or immunity, or (2) Congress has foreclosed citizen enforcement in the enactment itself, either explicitly, or implicitly by imbuing it with its own comprehensive remedial scheme. *See, e.g., id.*

It is important to distinguish an action asserting a claim under section 1983 for violation of a federal statutory right from an action asserting a claim directly under a federal statute. In a section 1983 action, the plaintiff must establish that Congress created an enforceable statutory right. In a direct statutory action, on the other hand, the plaintiff must establish that Congress not only created an enforceable statutory right, but also that it established a private right of action to enforce the right. The Supreme Court illuminated this difference in a footnote in *Wilder*, 496 U.S. at 508-09 n. 9, 110 S.Ct. at 2517 n. 9:

> The test [in direct statutory actions] reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes. Because § 1983 provides an "alternative source of *express* congressional authorization of private suits," these separation-of-powers concerns are not present in a § 1983 case. Consistent with this view, we recognize an exception to the general rule that § 1983 provides a remedy for violation of federal statutory rights only when Congress has affirmatively withdrawn the remedy.

496 U.S. at 508-09 n. 9, 110 S.Ct. at 2517 n. 9 (citations omitted).

In this case, we must first determine whether the statute and its interpretive regulations create an enforceable federal statutory right. Buckley and the PWIA assert a statutorily created right of equal access for boats of common horsepower at boat launch facilities constructed under the Act. Several factors are relevant to determining whether a statute creates an enforceable right: (1) whether the statutory provision at issue was intended to benefit the putative plaintiff; (2) whether the provision creates a binding obligation on the state rather than a mere congressional preference; and (3) whether the asserted interest is not so amorphous as to be "beyond the competence of the judiciary to enforce." *See id.* 496 U.S. at 509, 110 S.Ct. at 2517 (quoting *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106, 110 S.Ct. 444, 448, 107 L.Ed.2d 420 (1989) and *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 19, 101 S.Ct. 1531, 1541, 67 L.Ed.2d 694 (1981)).

The City of Redding argues that the Supreme Court in *Suter v. Artist M.*, 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992), altered this well-established analytic framework. In *Suter*, the Court was confronted with whether one could enforce the "reasonable efforts" requirement of the Adoption Assistance Act through an action under section 1983, or directly under that act itself. The Court found that the act did not create an enforceable right and that the plaintiff could, therefore, not bring an action under section 1983. Because the act did not create an enforceable right, the Court had no trouble concluding that the act also did not impliedly create its own private right of action. *Suter*, 503 U.S. at 363-64, 112 S.Ct. at 1370.

In analyzing the section 1983 issue, the *Suter* Court reaffirmed the analytic framework set forth in its prior cases. *See id.* at 355-57, 112 S.Ct. at 1366-67 (acknowledging established approaches set forth in *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980); *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987); *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981); *Wilder, supra*, and *Golden State, supra*). The first inquiry is whether the act in question unambiguously confers an enforceable right. *Suter*, 503 U.S. at 357, 112 S.Ct. at 1366. The Court stressed the "unambiguous" component of this analysis and concluded, without explicitly applying the three-part inquiry, that "the 'reasonable efforts' language [of the Adoption Assistance Act] does not unambiguously confer an enforceable right upon the Act's beneficiaries." *Id.* at 363, 112 S.Ct. at 1370. Having so concluded, the Court then turned to the second part of the section 1983 analysis – whether enforcement was expressly or implicitly foreclosed. The Court noted that prior cases found congressional intent to foreclose remedies under section 1983 "where the statute itself provides a comprehensive remedial scheme which leaves no room for additional private remedies under section 1983." *Id.* at 360 n. 11, 112 S.Ct. at 1368 n. 11. Because the Adoption Assistance Act did not create an enforceable federal right, the Court did not consider this issue, noting only that the act's own enforcement mechanisms, while insufficient to foreclose a section 1983 remedy in the context of an unambiguously conferred right, were sufficient to prevent the act's requirements from becoming a "dead letter." *Id.* at 360-61,

112 S.Ct. at 1368-69. This, apparently, is all that is required for foreclosure when the act in question is ambiguous as to whether it confers an enforceable right. *But see Wilder*, 496 U.S. at 520-21, 110 S.Ct. at 2523 (requiring "express provision or other specific evidence" of congressional intent to foreclose); *Wright*, 479 U.S. at 423-24, 107 S.Ct. at 770 (holding that Court will not "lightly" conclude that section 1983 is impliedly foreclosed).

Thus, the *Suter* opinion had only minimal impact on the analytic framework for determining whether a section 1983 action may be brought. The nature of the section 1983 remedy remains broad and may be used to remedy infringement of any unambiguously conferred right, privilege, or immunity, so long as Congress has not foreclosed use of the remedy explicitly, or implicitly by imbuing the act in question with its own comprehensive remedial scheme. To answer the initial question of whether the law in question unambiguously confers an enforceable right, we must still apply the three part test set forth in *Wilder* by asking: (1) whether the statutory provision at issue was intended to benefit the putative plaintiff, (2) whether the provision creates a binding obligation on the state rather than a mere congressional preference, and (3) whether the asserted interest is not so amorphous as to be "beyond the competence of the judiciary to enforce." *Wilder*, 496 U.S. at 509, 110 S.Ct. at 2517. If, after applying this test, a court concludes that an enforceable right has been unambiguously created, then the plaintiff may proceed with his section 1983 action unless it has been explicitly or implicitly foreclosed by Congress. Implicit foreclosure exists when a remedial scheme inherent in the federal statute itself is so comprehensive as to leave no

room for additional private remedies under section 1983. *See Suter*, 503 U.S. at 360 n. 11, 112 S.Ct. at 1368 n. 11; *Smith v. Robinson*, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981).

With this analytic framework clearly before us, we now turn to the particular issue in the present case. The Federal Aid in Sport Fish Restoration Act has, as its stated purposes, "the restoration, conservation, management, and enhancement of sport fish, and the provision for public use and benefits from these resources." 50 C.F.R. § 80.5(b). One aspect of this plan is to increase access for recreational boating and fishing. To this effect, the Act's enabling regulations require that at least ten percent of all funds distributed under the Act be allocated for recreational boating access facilities. 50 C.F.R. § 80.24. That regulation specifically states that "[a]ll facilities constructed . . . must be for the purpose of providing additional, improved, or safer access of public waters for boating recreation." The regulation goes on to make clear that although "a broad range of access facilities and associated amenities can qualify for funding under the 10 percent provision, *power boats with common horsepower ratings must be accommodated.*" *Id.* (emphasis added). Thus, a state may place horsepower limitations on boats using these facilities and surrounding waters. But, if the power boat is within the permissible horsepower range, the state must not discriminate among those power boats with common horsepower ratings.

Patrick Buckley and the PWIA assert that this provision of the Act creates a right enforceable under section

1983. The district court disagreed and dismissed their action for failure to state a claim. Applying the three-part test, it is clear that the Act confers a right enforceable under section 1983.

First, the Act clearly is intended to benefit the plaintiffs. The Act's regulations unambiguously state a purpose to increase access to waterways for recreational boaters and fishermen. Buckley and the PWIA have alleged an interest as recreational boaters and fishermen sufficient to establish standing to bring a section 1983 action under the Act. It is also clear that the Act creates a binding obligation on the state. In exchange for receiving funds under the Act, the state expressly promised to abide by the terms and regulations set forth in the legislation. 50 C.F.R. §§ 80.3, 80.21. The state's obligation is in the nature of a contract and is clearly binding. *See Pennhurst*, 451 U.S. at 17, 101 S.Ct. at 1539 (noting Congress's power to impose conditions when disbursing federal money to the States); *see also Suter*, 503 U.S. at 356, 112 S.Ct. at 1366. Finally, we do not think the asserted right is so amorphous as to be beyond our competence to enforce. To the extent the state permits access to one motorboat of a certain horsepower rating, it must also permit access to other motorboats of common horsepower ratings. Thus, we conclude that the Act unambiguously creates a right enforceable under section 1983.

Because the Act unambiguously creates an enforceable right, Buckley and the PWIA may bring their section 1983 action unless such an action was expressly or implicitly foreclosed by Congress. Nothing in the Act suggests that Congress expressly intended to foreclose the section 1983 remedy. Nevertheless, the City argues that Congress

impliedly foreclosed this remedy by providing a comprehensive remedial scheme within the Act itself. The City directs us to 50 C.F.R. § 80.21, which states that "[t]he Secretary shall have the right to review or inspect for compliance at any time. Upon determination of noncompliance, the Secretary may terminate or suspend those projects in noncompliance, or may declare the state ineligible for further participation in program benefits until compliance is achieved." This provision is similar to provisions of other acts that have been found not to be comprehensive for purposes of foreclosing a section 1983 action. In *Suter*, for example, the Adoption Assistance Act had a similar enforcement mechanism. The Court held that while this provision was sufficient to keep the requirements of the Act from becoming a "dead letter," it was not a "comprehensive remedial scheme" that would preclude a section 1983 action to enforce an unambiguous federal right. *Suter*, 503 U.S. at 360-61, 112 S.Ct. at 1368-69. To preclude enforcement under section 1983, the Act's remedial scheme must be so comprehensive as to leave no room for additional private remedies. *See id.* at 360 n. 11, 112 S.Ct. at 1368 n. 11. We conclude, therefore, that the Act does not foreclose Buckley and the PWIA from seeking redress via 42 U.S.C. § 1983.

The City argues that even if the Act permits enforcement via section 1983, Buckley and the PWIA have failed to state a claim because they cannot show that the City is not in compliance. The City argues that 50 C.F.R. § 80.24 merely requires that facilities built with funds disbursed under the Act be physically capable of accommodating boats of common horsepower ratings. Because the South

Bonnyview boat launch facility can physically accommodate personal watercraft, the City argues it has complied with the Act, regardless of the fact that the waterway in question is restricted and offers no practical accommodation to these vessels. We reject such a hypertechnical reading of the Act. The language of the regulation can just as easily be read to require both the facility and the waterway in question to meet the Act's requirements. Considered in the context of the Act's language as a whole, it is abundantly clear that Congress intended to have facilities such as the South Bonnyview boat launch facility accommodate motorboats of common horsepower in an effort to increase access to recreational waterways. The City's reading of the Act would allow it to receive the benefit of its bargain with Congress, i.e., receiving funding to subsidize construction of a boat launch facility, while avoiding its obligations under the Act. Such a reading would frustrate the purpose of the legislative enactment. The state would have another boat launch facility, but a class of intended beneficiaries under the Act would be deprived of its use.

The State applied for funds under the Act in 1988. As part of the application process it assented to the Act's terms. The City agreed to operate the facility knowing that the funds came from the Federal Aid in Sport Fish Restoration Act. In 1990, the City passed an ordinance restricting personal watercraft from using the waterway that was to benefit from the federal funding. In such a case, the City's restriction of the waterway is tantamount to restriction of the facility. To argue otherwise is simply disingenuous. Where two equally plausible readings of a

federal statute conflict, we will adopt the one that most closely comports with Congress's intentions.

CONCLUSION

Because the Federal Aid in Sport Fish Restoration Act confers a right enforceable through section 1983, the district court erred in dismissing Buckley's and PWIA's suit for failure to state a claim. Accordingly, we reverse the district court's dismissal of this section 1983 action and remand for further proceedings in accordance with this opinion. All parties shall bear their own costs.

REVERSED AND REMANDED.

Supreme Court, U.S.
FILED
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CLERK

(2)

No. 01-204

IN THE

Supreme Court of the United States

KISSIMMEE RIVER VALLEY SPORTSMAN ASSOCIATION,

Petitioner,

v.

CITY OF LAKELAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Circuit Court of Appeals for the Eleventh Circuit concluded that the Federal Aid in Sport Fish Restoration Act (Act), 16 U.S.C. §§ 777-777m, in conjunction with the regulations promulgated at 50 C.F.R. §§ 80.1-80.27, does not create a federal right to equal access for boats of common horsepower ratings at recreational boating access facilities funded under the Act and that, as a result, Petitioner, Kissimmee River Valley Sportsman Association, failed to state a cause of action under 42 U.S.C. § 1983. In reaching this holding, the Eleventh Circuit necessarily concluded that a federal regulation, standing alone, cannot create a federal right enforceable under 42 U.S.C. § 1983.

The first question presented is whether the court of appeals properly concluded that the Act, in conjunction with its regulations, does not create a federal right to equal access for boats of common horsepower ratings at recreational boating access facilities funded under the Act and that, therefore, Petitioner does not have any right enforceable under 42 U.S.C. § 1983.

The second question presented is whether the court of appeals properly concluded that a federal regulation, standing alone, cannot create a federal right enforceable under 42 U.S.C. § 1983.

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STATUTES, REGULATIONS, AND ORDINANCES INVOLVED IN THE CASE

1. Section 1983 of Title 42 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of *any rights, privileges, or immunities secured by the Constitution and laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

2. Section 777g(b)(1) of Title 16 of the United States Code provides, in pertinent part:

> Each State shall allocate 15 percent of the funds apportioned to it for each fiscal year under section 777c of this title for the payment of up to 75 per centum of the costs of *the acquisition, development, renovation, or improvement of facilities (and auxiliary facilities necessary to insure the safe use of such facilities) that create, or add to, public access to the waters of the United States to improve the suitability of such waters for recreational boating purposes* . . .

3. Section 80.24 of Title 50 of the Code of Federal Regulations provides, in pertinent part:

> The State shall allocate at least 10 percentum of each annual apportionment under Federal Aid in Sport Fish Restoration Act for recreational boating access facilities. All facilities constructed, acquired, developed, renovated, or maintained (including those existing structures for which maintenance is provided) must be for the purpose of providing additional, improved, or safer access of public waters for boating recreation as part of the State's effort for the restoration, management, and public use of sport fish. *Though a broad range of access facilities and associated amenities can qualify for funding under the 10 percent provision, power boats with common horsepower ratings must be accommodated, and, in addition, the State must make reasonable efforts to accommodate boats with larger horsepower ratings if they would not conflict with aquatic resources management . . .*

4. Section 58-32 of the Lakeland City Code provides, in pertinent part:

> It shall be unlawful for any person to operate any airboat upon any of the lakes within the city . . . For purposes of this section, "airboat" shall mean any boat, sled, sea skiff, or swamp boat pushed, pulled or propelled by air power generated by a motor of more than 25 horsepower.

STATEMENT OF THE CASE

On February 12, 1999, Petitioner filed suit against the City of Lakeland (City), seeking, *inter alia*, declaratory and injunctive relief under 42 U.S.C. § 1983. Petitioner alleged that the Federal Aid in Sport Fish Restoration Act (Act), 16 U.S.C. §§ 777-777m, and its regulations promulgated at 50 C.F.R. §§ 80.1-80.27 create a federal right to equal access for boats of common horsepower ratings at recreational boating access facilities funded under the Act. Petitioner further alleged that Section 58-32 in the Lakeland City Code, which prohibits the use of airboats on any lakes within the City, violates the federal right to equal access created by the Act and its regulations.

The City filed an Amended Motion to Dismiss, with a Memorandum of Law, arguing, *inter alia*, that Petitioner failed to state a cause of action for which relief could be granted under 42 U.S.C. § 1983. Specifically, the City argued that neither the Act nor its regulations, whether read together or separately, create a federal right to equal access that is enforceable under 42 U.S.C. § 1983.

On August 17, 2001, the district court granted the City's Motion and dismissed Petitioner's suit with prejudice. *See Kissimmee River Valley Sportsman Ass'n v. City of Lakeland*, 60 F. Supp. 2d 1289 (M.D. Fla. 1999). (Pet. App. at 9.)

On May 10, 2001, the court of appeals affirmed the district court's dismissal with prejudice. *See Kissimmee River Valley Sportsman Ass'n v. City of Lakeland*, 250 F.3d 1324 (11th Cir. 2001). (Pet. App. at 1.) Specifically, the court of appeals noted that a right to equal access for boats with

common horsepower ratings, if any existed at all, could only be found in the language of 50 C.F.R. § 80.24 — not the Act itself. *See id.* at 1327. The court concluded that this regulation was "too far removed from [c]ongressional intent" to create an enforceable right: "Nothing in the [Act] suggests a right based on equality and comparability. In fact, . . . [50 C.F.R. § 80.24] imposes new and 'distinct obligations' not found in the [Act] itself . . . [and] goes far beyond merely further defining or fleshing out the context of any 'federal right' found in the [Act] itself." *Id.* Accordingly, the court of appeals held that the Act and its regulations do not confer a federal right to equal access that is enforceable under 42 U.S.C. § 1983. *See id.*

This appeal ensued.

REASONS FOR DENYING THE WRIT

This Court should deny the Petition for Writ of Certiorari because Petitioner has failed to identify any "real and embarrassing conflict of opinion and authority" among the United States courts of appeal. *See Rice v. Sioux City Mem. Park Cemetery*, 349 U.S. 70, 79 (1954); Sup. Ct. R. 10(a). Likewise, Petitioner has failed to raise any "special and important" questions of federal law that this Court has not yet answered. *See Rice*, 349 U.S. at 74; Sup. Ct. R. 10(c).

Specifically, the Petition is deficient for one basic reason: it completely ignores the import of *Blessing v. Freestone*, 520 U.S. 329 (1997), in analyzing the questions presented. In *Blessing*, this Court illuminated the circumstances under which a federal regulation, in conjunction with a federal statute, can create a federal right enforceable under 42 U.S.C. § 1983. *See* 520 U.S. at 345. Consistent with this Court's precedent in determining the existence of a federal right,

Blessing requires courts to first examine a statute's underlying congressional intent before turning to that statute's implementing regulations. *See id.* After ascertaining whether Congress intended to create a federal right, courts must then determine whether the statute's regulations adequately implement that congressional intent or whether the link between the regulation and the statute is simply too tenuous to give rise to an enforceable federal right that is based, in part, on a federal regulation. *See id.*

In light of *Blessing*, this Court should deny the Petition for three specific and compelling reasons. First, only the Ninth and the Eleventh Circuit Courts of Appeal have considered whether the Act and its regulations create a federal right to equal access that is enforceable under 42 U.S.C. § 1983. To the extent that the Ninth Circuit conflicts with the Eleventh Circuit, the Ninth Circuit's analysis is incomplete because it pre-dates *Blessing*. As a result, the Ninth Circuit fails to adhere to *Blessing*'s requirement that courts establish a clear link between congressional intent and a statute's implementing regulations before enforcing a federal right that is based, in part, on a federal regulation. Second, since *Blessing*, only the Eleventh, Seventh, and Sixth Circuit Courts of Appeal have considered the broader issue of whether federal regulations, by themselves, can create a federal right enforceable under 42 U.S.C. § 1983. Because the Eleventh and Seventh Circuits are consistent with each other and with *Blessing* and only the Sixth Circuit is not, no widespread conflict exists among the courts of appeal. Finally, Petitioner ultimately seeks relief based on the perceived misapplication of a properly stated rule of law, thereby rendering this Court's review unnecessary.

I. Since *Blessing*, Only the Eleventh Circuit Has Considered Whether the Act and its Implementing Regulations Create a Federal Right.

Only the Eleventh Circuit and the Ninth Circuit have considered whether the Act and its implementing regulations create a federal right to equal access for power boats of common horsepower ratings. *See Kissimmee River Valley Sportsman Ass'n v. City of Lakeland*, 250 F.3d 1324 (11th Cir. 2001); *Buckley v. City of Redding*, 66 F.3d 188 (9th Cir. 1995). While the Eleventh Circuit held that the Act and its implementing regulations do not create a federal right to equal access, the Ninth Circuit did find that a federal right exists. *Compare Kissimmee River Valley*, 250 F.3d at 1326-27 *with Buckley*, 66 F.3d at 192-93. To the extent that *Buckley* conflicts with *Kissimmee River Valley*, the Ninth Circuit's analysis is incomplete because it pre-dates this Court's decision in *Blessing*. As a result, the Ninth Circuit fails to adhere to *Blessing*'s requirement that courts establish a clear link between congressional intent and a statute's implementing regulations before enforcing a federal right that is based, in part, on a federal regulation.

In its opinion, the Eleventh Circuit noted that the purpose of the Act is to provide funding for fish restoration and management projects and for creating and improving public access to the waters of the United States. *See Kissimmee River Valley*, 250 F.3d at 1326-27; *Buckley*, 66 F.3d at 192. Because the Act itself does not mention equal access for boats of common horsepower ratings, the Eleventh Circuit necessarily turned to the Act's regulations, specifically 50 C.F.R. § 80.24, to identify this right. *See Kissimmee River Valley*, 250 F.3d at 1326-27. Therefore, the Eleventh Circuit had to expressly determine whether 50 C.F.R. § 80.24, either by itself or in conjunction with the Act, created a federal right enforceable under 42 U.S.C. § 1983.

To answer this question, the Eleventh Circuit relied on its own precedent, *Harris v. James*, 127 F.3d 993 (11th Cir. 1997), which was issued about six months after *Blessing*. *See Kissimmee River Valley*, 250 F.3d at 1326-27. *Harris*, in turn, evaluated *Blessing* and this Court's long-standing test to determine whether a federal statute creates a federal right enforceable under 42 U.S.C. § 1983:

> Such an inquiry turns on whether the provision in question was intend[ed] to benefit the putative plaintiff . . . If so, the provision creates an enforceable right unless it reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation on the government unit . . . or unless the interest the plaintiff asserts is too vague and amorphous such that it is beyond the competence of the judiciary to enforce.[1]

Harris, 127 F.3d at 999 (quoting *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990)).

This test has governed § 1983 federal rights analysis as it applies to statutes for many years. *See Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423-24 (1987); *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 508-10 (1990); *Suter v. Artist M.*, 503 U.S. 347, 355-57 (1992); *Blessing*, 520 U.S. at 340-41. Notably, *Blessing* did not change this analysis; it simply clarified that congressional intent is the cornerstone of any federal rights analysis — even when a federal regulation, and not a statute,

1. After applying this three-prong analysis, courts must also consider whether the statute at issue explicitly or implicitly forecloses enforcement under 42 U.S.C. § 1983. *See Blessing*, 520 U.S. at 341.

seemingly establishes the federal right that a putative plaintiff seeks to enforce under 42 U.S.C. § 1983. *See Blessing*, 520 U.S. at 345.

After examining the contours and development of this three-prong test, the *Harris* court concluded that only Congress can create a federal right enforceable under 42 U.S.C. § 1983. *See Harris*, 127 F.3d at 1011. Because the three-prong test ultimately probes statutes for their underlying congressional intent, *Harris* rejected the notion that this test could be applied exclusively to federal regulations. *See id.* at 1008-10 ("To hold otherwise would be inconsistent with the driving force of the Supreme Court precedent requiring a [*c*]*ongressional* intent to create federal rights and with the Supreme Court directive that courts must find that Congress has *unambiguously* conferred federal rights on the plaintiff."). Finally, *Harris* concluded that a federal regulation, standing alone, can never create a federal right. *See id.* at 1011.

Instead, *Harris*, consistent with *Blessing*, requires litigants to first evaluate the controlling statute under the three-prong test to determine whether Congress has indicated an intent to create a federal right. *See Harris*, 127 F.3d at 1009. If not, then the inquiry ends, and the regulations become irrelevant to the federal rights analysis. *See id.* If, on the other hand, Congress did suggest an intent to create a federal right, then courts may examine the relevant regulations to determine whether those regulations explain the federal right intended by Congress. *See id.* If so, then the statute, in conjunction with its regulations, may create a federal right enforceable under 42 U.S.C. § 1983. *See id.* If the regulation, however, goes beyond explaining the statutory right and imposes obligations new and distinct from the statute, then the "regulation is too far removed from congressional intent to constitute a 'federal right' . . ." *Id.*

The *Harris* court's analysis does not create a new test in § 1983 jurisprudence, nor is it inconsistent with this Court's precedent. (Pet. at 6-7.) To the contrary, *Harris* and *Kissimmee River Valley* adhere to this Court's requirement in *Blessing* that congressional intent guide a court's federal rights analysis — even when the federal right seemingly arises from a federal regulation. *See Harris*, 127 F.3d at 1008-09; *Kissimmee River Valley*, 250 F.3d at 1326-27. Likewise, the Eleventh Circuit's analysis is not "premised upon a wariness of administrative regulations" as Petitioner suggests, (Pet. at 7), but, instead, emphasizes that federal regulations do play a role in both determining and then explaining congressional intent to create a federal right. *See Harris*, 127 F.3d at 1011; *Kissimmee River Valley*, 250 F.3d at 1326-27. Finally, the test articulated by *Harris* and implemented by *Kissimmee River Valley* is not devoid of "any useful analytical precision." (Pet. at 7.) Courts have consistently relied on federal regulations to determine congressional intent and interpret statutory provisions. *See Harris*, 127 F.3d at 1011-12. In short, Petitioner's criticisms of *Harris* and *Kissimmee River Valley* are without merit.

Following *Harris* and *Blessing*, the Eleventh Circuit in this case first determined that the Act, standing alone, does not suggest a right to equal access for power boats of common horsepower ratings. *See Kissimmee River Valley*, 250 F.3d at 1327. Then, the court concluded that 50 C.F.R. § 80.24 imposes new and distinct obligations from the Act and is, therefore, "too far removed" from congressional intent to constitute a federal right. *Id.* The court of appeals concluded that the Act and its regulations do not create a federal right of equal access enforceable under 42 U.S.C. § 1983. *See id.*

In *Buckley*, the Ninth Circuit applied the three-prong test at once to the Act and its regulations. *See* 66 F.3d at 192. Upon applying the three-prong test, the Ninth Circuit concluded that the Act, in conjunction with its regulations, confers a federal right to equal access. *See id.* at 192-93.

Because each court of appeals places different emphasis on the Act's regulations to determine whether a federal right exists, the explicit holdings of *Kissimmee River Valley* and *Buckley* conflict. *Compare Kissimmee River Valley*, 250 F.3d at 1327 *with Buckley*, 66 F.3d at 192. *Buckley* seemingly applies the three-prong test at once to both the Act and its implementing regulations, thereby treating the regulations and the Act similarly. *See Buckley*, 66 F.3d at 192. The Eleventh Circuit, on the other hand, declines to apply the three-prong test directly to the Act's implementing regulations and, instead, determines first whether Congress intended to create a federal right and then looks only secondarily to the regulations to define that federal right. *See Kissimmee River Valley*, 250 F.3d at 1326-27. *See also Harris*, 127 F.3d at 1008-10. This discrepancy between the courts of appeal rests in the fact that the Ninth Circuit was without this Court's emphasis in *Blessing* that congressional intent is the cornerstone of any § 1983 federal rights analysis — even when the federal right seemingly arises from a federal regulation. *See Blessing*, 520 U.S. at 345. Accordingly, the Ninth Circuit fails to first determine whether the Act expresses a congressional intent to create a federal right to equal access and second, whether the Act's implementing regulations are sufficiently linked to the Act's underlying congressional intent to create a federal right to equal access based on 50 C.F.R. § 80.24. In other words, *Buckley* fails to determine whether the Act's regulations implement the Act's congressional intent or go beyond it. Therefore, the *Buckley* analysis is incomplete under § 1983 jurisprudence since *Blessing*.

As a result, any conflict that may exist between the Ninth and Eleventh Circuits is not as direct as Petitioner would have this Court believe. To the contrary, any conflict that exists is minimal. Only the Eleventh Circuit has considered whether the Act and its regulations create a federal right to equal access in light of *Blessing*. Therefore, no "real and embarrassing conflict of opinion and authority" exists among the courts of appeal, and this Court should deny the Petition. *Rice v. Sioux City Mem. Park Cemetery*, 349 U.S. 70, 79 (1954).

II. Any Conflict Among the Courts of Appeal is Not "Real and Embarrassing."

The Petition seeks to invoke this Court's certiorari jurisdiction by pointing to an alleged "widespread debate" among the courts of appeal about whether a federal regulation can create a federal right under 42 U.S.C. § 1983. (Pet. at 8-9.) The Petition, however, fails to cite a single case that has examined this issue since *Blessing*. (Pet. at 8-9.) Despite the Petition's oversight, only three courts of appeal — the Eleventh, Sixth, and Seventh Circuits — have considered whether a federal regulation, by itself, can create a federal right in light of *Blessing*. Because the majority of the courts of appeal have not had ample time to apply and develop *Blessing*'s analysis, any conflict that exists among the courts of appeal is not "real and embarrassing" and, therefore, not sufficient to invoke the "limited reviewing power to which this Court is confined." *Rice*, 349 U.S. at 70, 74, 79.

Since *Blessing*, the Eleventh Circuit has held that because congressional intent is "the driving force" of this Court's federal rights analysis, a federal regulation, by itself, can never create a federal right. *See Harris*, 127 F.3d at 1008-

09, 1011; *Kissimmee River Valley*, 250 F.3d at 1326-27. In reaching its conclusion, the Eleventh Circuit noted that regulations may play an important role in explaining congressional intent to create a federal right but may not impose new and distinct obligations rising to the level of a federal right. *See Harris*, 127 F.3d at 1009-1[illegible]

Without explicitly confronting whether a federal regulation, by itself, may create a federal right, the Seventh Circuit has indicated its agreement with the Eleventh Circuit's analysis of the issue. *See Marie O. v. Edgar*, 131 F.3d 610, 620 n.17 (7th Cir. 1997). In *Marie O.*, the Seventh Circuit applied the three-prong test to the statute at issue to determine whether Congress intended to create a federal right. *See id.* at 618-22. The court then relied on the statute's regulations to define and explain that right. *See id.* at 620. Like *Blessing*, *Harris*, and *Kissimmee River Valley*, the Seventh Circuit noted that congressional intent is the focus of a § 1983 federal rights analysis and that regulations may only "further define and delineate the meaning of a statute to aid [a court's] analysis regarding whether the statutory and regulatory scheme creates rights enforceable under § 1983." *Id.* at 620 n.17.

In *Boatman v. Livingston*, however, the Sixth Circuit explicitly rejected the Eleventh Circuit's analysis in *Harris*. *See* 164 F.3d 286, 288-89 (6th Cir. 1998). Instead, the Sixth Circuit held that federal regulations have the force of law and, therefore, may create federal rights under 42 U.S.C. § 1983. *See id.* The court failed to cite *Blessing* and relied on precedent that pre-dates *Blessing*. *See id.* Even worse, the Sixth Circuit failed to analyze whether any congressional intent existed to create a federal right enforceable under 42 U.S.C. § 1983. Instead, the Sixth Circuit seemed to adopt

a bright-line test: any valid regulation may create a federal right enforceable under 42 U.S.C. § 1983. This Court's statement in *Blessing*, however, was clear: "our inquiry focuses on congressional intent." *Blessing*, 520 U.S. at 341. Nevertheless, the Sixth Circuit, and now Petitioner, have chosen to ignore this analysis.

One errant court does not create a "widespread debate" among the courts of appeal. Because the majority of the courts of appeal have not yet applied *Blessing*'s analysis to a federal regulation, the passage of time may further illuminate or completely extinguish the differences created by the Sixth Circuit's "force of law" analysis. *See Rice*, 349 U.S. at 77; *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("Resolution here . . . can await a day when the issue is posed less abstractly."). *See also McMonagle v. Northeast Women's Ctr., Inc.*, 493 U.S. 901, 901-03 (1989) (White, J., dissenting) (noting several cases in which this Court has declined to exercise jurisdiction where only one or two courts of appeal appear to conflict). Therefore, this Court should deny the Petition to allow the issue to percolate and further develop in the lower courts.

III. Petitioner Asserts Error that is Inappropriate for this Court's Review.

At bottom, Petitioner ultimately asks this Court to adopt a test that "simply requires consideration of the statute and regulation together." (Pet. at 11.) Because this is exactly the test that *Blessing*, *Harris*, and *Kissimmee River Valley* require, Petitioner seeks to invoke this Court's jurisdiction based on a perceived misapplication of a properly stated rule of law. As expressly recognized by this Court in its own rules, certiorari review is inappropriate to address such errors. *See* Sup. Ct. R. 10.

Specifically, *Blessing*, *Harris*, and *Kissimmee River Valley* require courts to first ascertain whether congressional intent exists to create a federal right and then to determine whether the regulations are sufficiently linked to that congressional intent. *See Blessing*, 520 U.S. at 345; *Harris*, 127 F.3d at 1009; *Kissimmee River Valley*, 250 F.3d at 1326-27. In other words, these cases already require what Petitioner is seeking here: that courts consider statutes and their regulations together under a § 1983 federal rights analysis. The court of appeals below applied this analysis to the Act and its regulations to determine that a federal right to equal access does not exist. *See Kissimmee River Valley*, 250 F.3d at 1326-27. Petitioner simply disagrees with this outcome. Therefore, Petitioner's asserted error is not based on an important question of federal law that has yet to be determined. Instead, Petitioner complains that the court of appeals misapplied law that has already been established by *Blessing*, *Harris*, and *Kissimmee River Valley*. This type of error is inappropriate for this Court's review. *See* Sup. Ct. R. 10. Accordingly, this Court should deny the Petition. *See id.*

CONCLUSION

This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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